

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Bruce Lee,)	
)	
Plaintiff and Appellant,)	
)	Supreme Court No. 20060321
vs.)	
)	Mercer County No. 01-C-1075
Susan Lee,)	
)	
Defendant and Appellee.)	

Appeal from the Amended Judgment dated August 9, 2006,
the Second Amended Judgment dated August 11, 2006,
the Corrected Second Amended Judgment dated August 24, 2006,
and the Order on Motions dated September 11, 2006
of the Mercer County District Court,
South Central Judicial District,
Honorable Sonna M. Anderson

Brief of Appellant

Loren McCray (ID #05174)
Attorney for the Appellant
419 East Broadway
P.O. Box 2732
Bismarck ND 58502-2732
(701) 223-9929

Table of Contents

	Paragraph
Table of Authorities	1
Statement of Issues	2
Statement of Case	4
Statement of Facts	14
Law and Argument	28
Was the trial court clearly erroneous in modifying spousal support by retroactively awarding Susan Lee an increase to \$700 from the date of the divorce and extending the obligation through January 2007?	29
Did the trial court have subject matter jurisdiction to modify spousal support?	42
Conclusion	47

Table of Authorities

Cases	Paragraph
<u>Bellefeuille v. Bellefeuille</u> , 2001 ND 192, 636 N.W.2d 195	43, 46
<u>Lee v. Lee</u> , 2005 ND 129, 699 N.W.2d 842 _____	10, 30, 31, 44
<u>Lucier v. Lucier</u> , 2007 ND 3, 725 N.W.2d 899	31, 32, 34
<u>Quamme v. Bellino</u> , 2002 ND 159, 652 N.W.2d 360	46
<u>Rothberg v. Rothberg</u> , 2006 ND 65, 711 N.W.2d 219	32, 33, 34
<u>Trottier v. Bird</u> , 2001 ND 177 ¶ 5-7, 635 NW 157	45
Statutes and Rules	
NDCC § 14-09-08.4	17, 40
NDCC § 14-09-08.9	17, 40
NDAC § 75-02-04.1-09(2)(j)	17, 40
NDRCivP 12(h)(3)	45

2

Statement of Issues

3

Was the trial court clearly erroneous in modifying spousal support by retroactively awarding Susan Lee an increase to \$700 from the date of the divorce and extending the obligation through January 2007?

4

Did the trial court have subject matter jurisdiction to modify spousal support?

5

Statement of Case

6 The parties were divorced on January 9, 2004. (Record on Appeal). The divorce
was pursuant to a written property settlement agreement. (Id.).

7 On January 29, 2003, Bruce Lee [hereinafter “Bruce”] brought a motion to establish
child support. (Record on Appeal). On February 25, 2003, Susan Lee [hereinafter “Susan”]
responded with a motion to increase the amount and duration of spousal support. (Record
on Appeal). The trial court denied both motions on the grounds that its interpretation of the
property settlement agreement was that child support would not be sought until after the 24th
payment of child support was made. (Record on Appeal, Order dated July 10, 2003).

8 Bruce brought another motion to establish child support on January 9, 2004.
(Appendix [hereinafter “A”] at 5). Susan again resisted the motion and requested that spousal
support be reestablished for an additional period of time and increased. (A 9). The hearing
was held on March 4, 2004, and March 19, 2004. The trial court denied both motions and
in an Order dated May 24, 2004, and required Bruce to pay Susan \$1,500 in attorney’s fees
(Record on Appeal).

9 Bruce filed a Notice of Appeal on July 8, 2004. Susan filed her Cross-Appeal on July
16, 2004.

10 The North Dakota Supreme Court issued its decision on July 13, 2005. The Court
found that Susan’s child support obligation would have to be reconsidered and that this
obligation may constitute a change in circumstances for which the trial court may also
reconsider Bruce’s spousal support obligation. Lee v. Lee, 2005 ND 129 ¶ 14, 699 N.W.2d
842. The Court upheld the award of attorney’s fees. Id. at ¶ 18.

11 On September 15, 2005, Susan applied for an Order to Show Cause why Bruce

should not be held in contempt for failing to pay the attorney's fees in the amount of \$1,500. (Record on Appeal). Although an Order apparently was never issued, a hearing on the application and to adduce additional evidence concerning reconsideration of spousal support and child support was held on November 9, 2005.

12 On July 16, 2006, the trial court issued its order on spousal support and child support. (A 15). An Amended Judgment was entered on August 9, 2006, a Second Amended Judgment was entered on August 11, 2006, and a Corrected Second Amended Judgment was entered on August 24, 2006. The Amended Judgment retroactively ordered Bruce to pay spousal support in the amount of \$700 from January 1, 2002, through January 2007. (A 28). The Second Amended Judgment ordered Susan to pay child support retroactively from January 1, 2002, through December 1, 2002, in the amount of \$492 per month, and from December 1, 2002, through May 1, 2006, in the amount of \$459 per month. The effect of the orders was to have Bruce pay an additional \$16,785 in spousal support after set offs for the child support Susan was ordered to pay.

13 On August 25, 2006, Bruce brought a Motion to Amend the Judgment. (A 34). On August 30, 2006, Bruce brought a Motion to Stay Enforcement of Judgment. (A 41). Susan responded and again asked Bruce to be held in contempt for failure to pay attorney's fees from the May 24, 2004, Order. (A 44). Without a further hearing, the trial court denied the Motion to Amend Judgment, and held Bruce in contempt for failure to pay attorney's fees. (A 46).

14 Bruce appealed the trial court's orders on November 9, 2006. (A 48).

16 On December 20, 2001, Bruce and Susan entered into a written divorce stipulation entitled “Property Settlement, Child Custody, Child Support, and Spousal Support Agreement” [hereinafter “stipulation”]. (Record on Appeal). The stipulation was incorporated into a judgment with identical terms.

17 Both parties were represented by counsel at the time the stipulation was signed. (Record on Appeal); (Transcript of Testimony from March 19, 2004 [hereinafter “TII”] at 54, ls. 20-22; TII 39, ls. 5-22). The stipulation provides that Bruce shall have primary physical custody of the parties’ minor child. (Record on Appeal). Paragraph V of the stipulation addresses child support. It provides in pertinent part:

“[Susan] shall not pay child support at this time under NDAC § 75-02-04.1-09(2)(j), because of a reduced ability to pay support due to her taking over the parties’ business pursuant to this divorce, refinancing said business and her income being speculative, and in consideration for a lesser spousal support award.”

* * *

“The parties are advised that child support may, in addition to any other basis for modification, be amended on the auspices of NDCC Section 14-09-08.9 which provides that:

An obligor or an obligee may request review under Section 16 of Chapter 148 of the 1980 Session Laws or Section 14-09-08.4, by applying to the child support agency for child support services, and indicating, in the manner there provided, their

desire to have a child support order reviewed. Each judgment or order issued by a court in this state which includes an order for child support must include a statement advising of the right to request a review under this section.”

(Record on Appeal).

18 Paragraph XIII of the stipulation provides that Bruce shall pay Susan \$250 per month in rehabilitative spousal support for 24 months, commencing January 15, 2002. (Record on Appeal). Bruce completed this obligation prior to bringing his present motion to establish child support. (Transcript of Testimony from March 4, 2004 [hereinafter “T”] at 16, ls. 3-16).

19 Susan’s 2002 income tax return showed net business income of \$31,540. (Record on Appeal). Her 2003 income tax return showed net business income of \$26,491. (A 24).

20 Bruce presented evidence that Susan made substantial tips that were not reported on her income tax returns. (T 23-25, ls. 5- 18; T 30-36, ls. 4-16). She also had rental income commencing in October 2003, ranging between \$100 to \$200 per month. (TII 72-77, ls.2-11).

21 Bruce testified that he brought the motion to establish child support because he wasn’t able to make ends meet. (T 43, ls. 4-6). Bruce’s Affidavit of Financial Resources showed that he was going into the hole \$583.25 per month with his personal finances. (Record on Appeal).

22 Susan did not file her Cross-Motion to modify spousal support until after Bruce Lee’s spousal support obligation had expired and been paid in full. (Record on Appeal).

23 Bruce testified that he did not think at the time of signing the stipulation that the intent

was to waive his right to ever receive child support. (T 42-43, ls. 9-6). Susan's understanding is unclear. (T 63-65, ls.10-11).

24 The trial court found that the parties intended to waive child support as long as the specific conditions delineated in Paragraph V of the stipulation existed. (Record on Appeal). Specifically, the trial court found as follows:

“None of the specifically enumerated circumstances have changed in two years. The evidence before the Court shows that the business is still struggling and the profitability and future success of the business is still speculative. Susan has assumed the financial burden of paying off the business debt, she is working for little or no pay, and other than minimal additional rental from the building, the only change in Susan's financial picture between 2002 and 2004 is that she no longer receives spousal support. Her financial position is more precarious now than it was then.”

(Record on Appeal).

25 Bruce appealed the trial court's order and Susan cross-appealed. After remand, the trial court adduced additional evidence at a hearing held on November 9, 2005. Susan's 2004 income tax return was entered into evidence at the hearing. (Transcript of Testimony from November 9, 2005 hearing [hereinafter “TIII”] at 33, ls. 14-16); (Record on Appeal). The 2004 income tax return showed that she had a slight increase in income from 2003. (TIII at 39-40, ls. 22-22). Further evidence showed that Susan took out a \$63,000 loan to improve her business, but the interest expense for the loan did not lower her net income from 2003. (TIII at 42-43, ls. 5-7).

26 The evidence further showed that Susan had recently purchased a 2003 Chevy Impala,

and had taken a 10 day trip to South Korea. (TIII at 44, ls. 2-16); (TIII at 40-41, ls. 23-16).

27 Bruce, on the other hand, had not worked since September 27, 2006, due to shoulder and back injuries. (TIII 6, ls. 9-11). He did not expect to be able to ever return to work. (TIII 4-5, ls. 16-24). Although he was receiving sick pay, his income had dropped because he no longer received overtime. (TIII 16, ls. 11-20). Bruce expected to go on long-term disability at two-third's of his salary. (TIII 17, ls. 2-18). From there, he expected to get on Social Security disability. Id.

29 **Was the trial court clearly erroneous in modifying spousal support by retroactively awarding Susan Lee an increase to \$700 from the date of the divorce and extending the obligation through January 2007?**

30 Spousal support may be modified upon a showing of a material change in circumstances. Lee v. Lee, 2005 ND 129 ¶ 12, 699 N.W.2d 842

31 A material change of circumstances warranting the modification of spousal support is something substantially affecting the financial abilities or needs of a party. Id. “Slight, or even moderate changes in the parties’ relative incomes are not necessarily material.” Lucier v. Lucier, 2007 ND 3 ¶ 7, 725 N.W.2d 899.

32 “A change that was contemplated by the parties at the time of the initial decree is not a material change in circumstances.” Id. A contemplated change is one the parties considered when entering into a stipulated agreement. Id. When a divorce decree is based upon a stipulated agreement, the issue of whether a change was contemplated is viewed with greater scrutiny. Id. “Stipulated spousal support awards should be changed only with great reluctance.” Rothberg v. Rothberg, 2006 ND 65 ¶ 11, 711 N.W.2d 219.

33 The party claiming that a material change in circumstances bears the burden of proof. Id. at ¶ 10.

34 The trial court’s finding of fact that there has been a change in circumstances warranting a modification of support will be set aside on appeal only if it is clearly erroneous. Id. A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, there is no evidence to support it, or the court is left with a definite and firm conviction that a mistake has been made. Lucier, 2007 ND 3 at ¶ 8.

35 Susan made substantially the same income in 2002, 2003, and 2004. (A 25); (TIII at 39-40, ls. 22-22). There is no evidence that she expected her income level to be higher at the time of her divorce or that her business income decreased after the divorce.

36 In contrast, Bruce's financial situation was dismal. He had been on extended sick leave at the time the hearing on November 9, 2005, and expected to go on long-term disability. (TIII 6, ls. 9-11); (TIII 17, ls. 2-18).

37 The trial court's review of this evidence convinced it that Bruce should pay a total of \$42,000 in spousal support, to be offset by \$19,215 in child support. (A 25). This resulted in Bruce being obligated to pay \$22,785 in spousal support, an increase of \$16,785 and nearly quadruple his original obligation. Payment of this \$16,785 increase would be borne by Bruce subsequent to the hearing on November 9, 2005, where the evidence presented to the trial court was that Bruce was no longer able to work at Ottertail.

38 Susan, on the other hand, had steady income and financial circumstances in 2002, 2003, and 2004.

39 In effect, the trial court punished Bruce Lee for seeking child support and rewrote the parties' stipulated property settlement. The trial court did so without considering the substantial marital property received by Susan through the property settlement agreement, including the parties' business and 68% of Bruce Lee's retirement savings account with Ottertail. (Record on Appeal).

40 Rather than giving deference to the stipulated agreement, the trial court found a change in circumstances because Susan's duty to support her child was a changed circumstance not contemplated by her. This ignores the fact that every parent should contemplate they have a duty to support their child. It further ignores the fact that property

settlement agreement specifically provided as follows:

“[Susan] shall not pay child support at this time under NDAC § 75-02-04.1-09(2)(j), because of a reduced ability to pay support due to her taking over the parties’ business pursuant to this divorce, refinancing said business and her income being speculative, and in consideration for a lesser spousal support award.”

* * *

“The parties are advised that child support may, in addition to any other basis for modification, be amended on the auspices of NDCC Section 14-09-08.9 which provides that:

An obligor or an obligee may request review under Section 16 of Chapter 148 of the 1980 Session Laws or Section 14-09-08.4, by applying to the child support agency for child support services, and indicating, in the manner there provided, their desire to have a child support order reviewed. Each judgment or order issued by a court in this state which includes an order for child support must include a statement advising of the right to request a review under this section.”

(Record on Appeal).

41 Even if child support was not contemplated by the parties at the time of the divorce, and even if child support and spousal support are interrelated by virtue of the terms of the property settlement agreement, the evidence does not warrant a modification requiring Bruce to pay an additional \$16,785 in spousal support.

Dated this 13th day of February, 2007.

/S/ Loren McCray
Loren McCray (ID #05174)
Attorney for the Appellant
419 East Broadway
P.O. Box 2732
Bismarck ND 58502-2732
(701) 223-9929

CERTIFICATE OF SERVICE

Loren McCray certifies that on the 13th day of February, 2007, he served the following documents:

1. Brief of Appellant

upon: Brenda Neubauer
Attorney at Law
P.O. Box 1015
Bismarck, ND 58502-1015

in the following manner:

- ☐ by handing a true and correct copy to the attorney personally.
- ☐ by leaving a true and correct copy at the office of the attorney with a clerk or other individual in charge thereof.
- ☐ by leaving a true and correct copy at the office of the attorney in a conspicuous place therein.
- ☐ by placing a true and correct copy thereof in an envelope so addressed and depositing the same, with postage prepaid, in the United State mail at Bismarck, North Dakota.
- ☐ by facsimile transmission to the attorney at the facsimile number at p.m. (CT).
- ☒ by email to lawoffice@mcleodusa.net at 6:12 a.m. (CT)

/S/Loren McCray
Loren McCray (ID #05174)
Attorney at Law